

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

ANTHONY EARL HARP,

Defendant-Appellant.

UNPUBLISHED

January 10, 2008

No. 274468

Wayne Circuit Court

LC No. 06-008239-01

Before: Fitzgerald, P.J., and Markey and Smolenski, JJ.

PER CURIAM.

Following a jury trial, defendant appeals as of right from his conviction of four counts of first-degree criminal sexual conduct, MCL 750.520b(1)(f). He was sentenced as a habitual offender, second offense, MCL 769.10, to four concurrent terms of 45 to 90 years. We affirm. This appeal is being decided without oral argument pursuant to MCR 7.214(E).

Defendant first argues that the evidence of personal injury was insufficient to support a conviction for first-degree criminal sexual conduct. This Court reviews a challenge to the sufficiency of the evidence de novo in the light most favorable to the prosecution to determine whether a rational trier of the fact could find that the essential elements of the crime were proven beyond a reasonable doubt. *People v Johnson*, 460 Mich 720, 723; 597 NW2d 73 (1999).

The elements of first-degree criminal sexual conduct are: “the actor (1) causes personal injury to the victim, (2) engages in sexual penetration with the victim, and (3) uses force or coercion to accomplish the sexual assault.” *People v Nickens*, 470 Mich 622, 629; 685 NW2d 657 (2004). MCL 750.520a(m) defines personal injury as “bodily injury, disfigurement, mental anguish, chronic pain, pregnancy, disease, or loss or impairment of a sexual or reproductive organ.”

Both bodily injury and mental anguish were established at defendant’s trial. Regarding bodily injury, the victim suffered from bruises to her arms, chest, neck, and back and a hematoma on her shoulder. Her groin area was very tender, and she had an abrasion in the entrance to her vagina. Viewing this evidence in a light most favorable to the prosecution, there was sufficient evidence of bodily injury to sustain the conviction for first-degree criminal sexual conduct. Regarding mental anguish, the victim testified that she was terrified during the assault and afraid that defendant would kill her. She testified that she did not want anyone to know about the assault because she was scared and because defendant still lived in her building. The nurse testified that the victim was scared and tearful when she spoke to her days after the

incident. Viewing this evidence in a light most favorable to the prosecution, mental anguish was also established.

Next, defendant argues that the trial court erred by failing to give a requested jury instruction for the lesser included offense of third-degree criminal sexual conduct. “An inferior offense instruction is appropriate only when a rational view of the evidence supports a conviction for the lesser offense.” *People v Mendoza*, 468 Mich 527, 545; 664 NW2d 685 (2003). Third-degree criminal sexual conduct is a lesser included offense of first-degree criminal sexual conduct. *People v Mosko*, 441 Mich 496, 501; 495 NW2d 534 (1992). The difference between the two offenses is that third-degree criminal sexual conduct does not require the element of personal injury. When examining whether a rational view of the evidence supported a conviction of third-degree criminal sexual conduct, the Court must determine if there was a dispute about personal injury.

As discussed above, personal injury could have been established in two ways in this matter, by bodily injury or mental anguish. Because there was some dispute regarding the extent of the complainant’s injuries caused by defendant, the trial court erred in refusing defendant’s request for a third-degree criminal sexual conduct instruction. However, this error was harmless where the evidence supporting third degree criminal sexual conduct was not substantial. More than an evidentiary dispute is required for reversal. *People v Cornell*, 466 Mich 335, 362-367; 646 NW2d 127 (2002). Defendant’s defense in this case was that the sex was consensual. Clearly, the jury rejected that defense and found the victim’s testimony regarding what happened to be more credible than defendant’s version of events. Based on the jury’s decision in that regard, it is likely that they also gave more credibility to the victim’s testimony regarding her physical injuries and her emotional status. Therefore, the error in failing to give the jury instruction did not determine the outcome of the case and was harmless.

Finally, defendant argues that he should be resentenced because the trial court incorrectly scored Offense Variable (OV) 7 at 50 points. We disagree. “This Court reviews a sentencing court’s scoring decision to determine whether the trial court properly exercised its discretion and whether the record evidence adequately supports a particular score.” *People v McLaughlin*, 258 Mich App 635, 671; 672 NW2d 860 (2003). MCL 777.37(1)(a) provides that a sentencing court should score OV 7 at 50 points where “[a] victim was treated with sadism, torture, or excessive brutality or conduct designed to substantially increase the fear and anxiety a victim suffered during the offense.”

Regarding its decision to scoring decision, the trial court noted that defendant told the victim that “it was going to last all night long,” that there were several occasions where the victim was told that her neck would be broken or that she would be killed if she did not comply, and defendant held her for eight hours. Defendant also cursed at the victim in a way he had never spoken to her before, grabbed her by the hair, and attempted to force her to perform fellatio. The victim testified that defendant told her that he knew he was never going to get this again, so he was going to get as much of it as he wanted. These actions all appear to be designed to increase the victim’s fear or anxiety during the sexual assault. The trial court did not abuse its discretion in finding that defendant’s conduct was designed to substantially increase the fear and anxiety of the victim.

Affirmed.

/s/ E. Thomas Fitzgerald

/s/ Jane E. Markey

/s/ Michael R. Smolenski